

## COMMENT

### The Treaty Problem: Understanding the Framers' Approach to International Legal Commitments

#### INTRODUCTION

In 2014, when the Supreme Court decided *Bond v. United States*, it confronted an issue of structural federalism that had long vexed advocates of big and small government alike.<sup>1</sup> The issue stemmed from the tension between the broad, exclusive power the Constitution grants to the federal government to conclude international treaties and the limitations that the Constitution places on Congress's domestic authority vis-à-vis the states.<sup>2</sup> When these powers and limitations conflict, which should win out? How expansive *should* the federal government's treaty power be? For both champions and critics of international law, the Court's response in *Bond*<sup>3</sup> left much to be desired.

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1. 134 S. Ct. 2077 (2014).

2. *Id.* at 2086-87. The Court had last addressed the tension between the scope of the treaty power and the Tenth Amendment in *Missouri v. Holland*, 252 U.S. 416 (1920). In *Holland*, the Court held that the Necessary and Proper Clause allowed Congress to enact legislation implementing a treaty with Great Britain even though, in the absence of such a treaty, the legislation would have exceeded Congress's Article I, Section 8 powers and infringed on powers reserved to the states under the Tenth Amendment. *Id.* For historical discussions of this core conflict, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 409-33 (1998); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1257-69 (2000); Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 279-304 (2013); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005); and Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003).

3. The case first reached the Court in 2011, when the Court held petitioner Bond had standing to challenge the Chemical Weapons Implementation Act under the Tenth Amendment and remanded her case to the Third Circuit to adjudicate her claim on the merits. *See Bond v. United States*, 564 U.S. 211, 214 (2011). Following the approach adopted by much of the literature on the treaty power, this Comment refers to the 2014 decision as "*Bond*," despite the

Admittedly, *Bond* offered the Court an unlikely set of facts through which to clarify the scope of the treaty power. After petitioner Carol Ann Bond was caught attempting to inflict chemical burns on her husband's pregnant mistress, she was charged with possessing and using a chemical weapon in violation of the federal statute implementing the international Chemical Weapons Convention (CWC).<sup>4</sup> Bond argued that charging her under the statute was unconstitutional because the statute exceeded Congress's enumerated powers and invaded powers reserved to the states under the Tenth Amendment.<sup>5</sup> Rather than definitively establish the proper scope of the treaty power in relation to Congress's enumerated powers, the Court sidestepped the issue, holding simply that Congress never intended the statute to extend to Bond's conduct in the first place.<sup>6</sup>

The questions of structural federalism left unresolved by *Bond* hold real-world significance in today's era of increasing global interconnectedness. As the petitioner and Justice Scalia emphasized in *Bond*, the scope and subject matter of international treaties have expanded dramatically since the Founding Era.<sup>7</sup> Whereas late eighteenth- and nineteenth-century treaties typically governed relations *between* nations, international agreements since the latter half of the twentieth century increasingly cover nations' treatment of their own citizens.<sup>8</sup> Without clearer guidance from the Court, it remains possible that the U.S. government could ratify and implement a treaty that abolished solitary confinement

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case's prior appearance before the Court. See, e.g., Curtis A. Bradley, *Federalism, Treaty Implementation, and Political Process: Bond v. United States*, 108 AM. J. INT'L L. 486, 486 (2014); William S. Dodge, *Bond v. United States and Congress's Role in Implementing Treaties*, 108 AJIL UNBOUND 86, 86 (2014); Gary Lawson, *Original Foreign Affairs Federalism*, 97 B.U. L. REV. 301, 309 n.41 (2017).

4. *Bond*, 134 S. Ct. at 2085.

5. *Id.*

6. See *id.* at 2087-90. Compared to the majority opinion, Justices Scalia, Thomas, and Alito more eagerly engaged with the constitutional issues posed by the case, arguing that the treaty power did not extend Congress's legislative power into areas traditionally reserved for state control. *Id.* at 2098 (Scalia, J., concurring in the judgment); *id.* at 2103 (Thomas, J., concurring in the judgment); *id.* at 2111 (Alito, J., concurring in the judgment).

7. *Id.* at 2100 (Scalia, J., concurring in the judgment); Brief for Petitioner at 25, *Bond*, 134 S. Ct. 2077 (No. 12-158) (citing Robert Knowles, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 NW. U. L. REV. 735, 749-50 (2001)).

8. *Bond*, 134 S. Ct. at 2100 (Scalia, J., concurring in the judgment) (citing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 14 (1995)); see, e.g., Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

in state prisons,<sup>9</sup> imposed new criteria for state adjudication of child removals,<sup>10</sup> or otherwise infringed upon powers historically reserved to the states under the Tenth Amendment. As Justice Thomas warned in his *Bond* concurrence, “Given the increasing frequency with which treaties have begun to test the limits of the Treaty Power,” the Court’s opportunity to “address the scope” of that authority again will “come soon enough.”<sup>11</sup>

To better understand the treaty power, scholars and litigants have drawn on historical understandings of the power’s scope, with special emphasis on the views of the Framers.<sup>12</sup> Academics and practitioners alike have debated how the Framers conceived of the treaty-making power and whether they envisioned a

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9. States run prisons independent of the federal prison system and have historically had great leeway to do so, with the principal federal limitations on this authority stemming from the U.S. Constitution’s protections for individual rights as incorporated against the States. *See, e.g., United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995). But what would happen if the federal government ratified and implemented a treaty expanding the rights of prisoners? For example, could the federal government compel state prisons to comply with implementing legislation that prohibited solitary confinement? Without a clearer understanding of the scope of the treaty power the answer is unclear, but at least one scholar has argued in the affirmative. *See* Kathryn D. DeMarco, Note, *Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and Its Impact on the Use of Supermax Solitary Confinement*, 66 U. MIAMI L. REV. 523, 554 (2012).
  10. In the United States, family law concerning children is one of the quintessential “areas of law traditionally thought to be reserved to the states.” Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 177 (2006) (citing Susan Kilbourne, Student Research, *The Convention on the Rights of the Child: Federalism Issues for the United States*, 5 GEO. J. ON FIGHTING POVERTY 327, 327 (1998)). In particular, disputes over child custody, removal, and family reunification are almost exclusively governed by state law and fall under the jurisdiction of state and local courts. *See Family Law in the 50 States*, A.B.A. (Sept. 2017), [https://www.americanbar.org/groups/family\\_law/resources/family\\_law\\_in\\_the\\_50\\_states.html](https://www.americanbar.org/groups/family_law/resources/family_law_in_the_50_states.html) [<https://perma.cc/QXY3-2BZF>]; *see, e.g., KAN. STAT. ANN. § 38-2201-89* (2018); N.Y. FAM. CT. ACT, art. 1, 6, 10, 10-a, 11. In 1995, however, President Clinton signed the United Nations Convention on the Rights of the Child (CRC), which sought to establish international rules for family separation, reunification proceedings, and capital punishment for children – rules that conflicted with family law in some U.S. states. *See* Convention on the Rights of the Child, *supra* note 8, arts. 3, 9, 10; Rutkow & Lozman, *supra*, at 171, 177. Although the Senate never ratified the CRC, it remains an open question whether the federal government could have overridden state family laws and child removal proceedings under the auspices of implementing the CRC.
  11. *Bond*, 134 S. Ct. at 2110-11 (Thomas, J., concurring in the judgment).
  12. *See, e.g., id.* at 2100 (Scalia, J., concurring in the judgment); Brief for Petitioner, *supra* note 7, at 24; Brief for the United States at 29-33, *Bond*, 134 S. Ct. 2077 (No. 12-158); Brief for Professors David M. Golove, Martin S. Lederman, and John Mikhail as Amici Curiae in Support of Respondent at 9-11, *Bond*, 134 S. Ct. 2077 (No. 12-158); Brief of the Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of Respondent at 2, 10-13, *Bond*, 134 S. Ct. 2077 (No. 12-158) [hereinafter GLC Brief].

power that would enable Congress to supersede contradictory state laws even in areas otherwise beyond its enumerated powers.<sup>13</sup> Unsurprisingly, the Framers disagreed on many issues.<sup>14</sup> Yet, as this Comment lays out, past analyses of the treaty power have overlooked certain foundational premises on which the Framers largely agreed.<sup>15</sup>

This Comment focuses on a heretofore underexplored factor driving the Framers' formulation of the treaty power: the threat of war inherent in all treaty violations at the time of the Founding. During this period, the international legal order permitted nations to wage war in response to treaty violations—and they

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13. See *Missouri v. Holland*, 252 U.S. 416 (1920); Bradley, *supra* note 2; Golove, *supra* note 2; Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008); Hathaway et al., *supra* note 2.

14. See Golove, *supra* note 2, at 1104-15, 1132-40.

15. Curtis Bradley, Daniel Golove, Oona Hathaway, and Nicholas Quinn Rosenkranz have written seminal works examining the origins of the treaty power and its scope. See sources cited *supra* note 2. However, none of these scholars discussed the threat of war inherent in treaty-making at the time, and none of their works examined the crucial role that factor played in the Framers' formulation of the treaty power. See Bradley, *supra* note 2, at 409-33; Golove, *supra* note 2, at 1257-69; Hathaway et al., *supra* note 2, at 279-304; Rosenkranz, *supra* note 2, at 1912-19. Although John Yoo's work on the original understanding of the treaty power quotes James Madison alluding to the risk of war inherent in treaty-making at the time, Yoo fails to analyze this reference or discuss the influence it had on the Framers. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2030 (1999). Edwin Dickinson's 1952 work on the role of the law of nations in the United States introduces the same Madison quote in discussing the New Jersey Plan, yet Dickinson too fails to discuss the impact that the threat of war embedded in the treaty power may have had on the Framers. See Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 38 (1952). Beth Stephens does mention that "violations of the laws of nations gave cause for war—a danger very much on the minds of the framers as they drafted the Constitution." Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 465 (2000). However, Stephens does not identify treaty violations specifically as a violation of the law of nations that could give rise to war, and Stephens only discusses the impact that this risk of war may have had on the formulation of the Offenses Clause rather than on the federal treaty power and the Supremacy Clause. See *id.* at 465-76. Oona Hathaway and Scott Shapiro also recently published a book on the Peace Pact of 1928 and the evolution of international laws governing war, which notes the high number of war manifestos from the fifteenth century to the Second World War that cited treaty violations as a just cause for war. OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 42-44 (2017). Hathaway and Shapiro also briefly touch on the role that this legal framework may have had on the Framers. *Id.* at 44 ("Violations of international law were not merely a cause for complaint. They were a just cause for war . . . . The Framers of the U.S. Constitution understood this well."). However, Hathaway and Shapiro devote only two paragraphs to this discussion and do not examine the role that the legal risks inherent in treaty violations may have had in shaping the treaty power and Supremacy Clause specifically. *Id.*

often did.<sup>16</sup> As students of Hugo Grotius and Emer de Vattel,<sup>17</sup> the Framers were well aware that breaching a treaty could expose the fledgling United States to lawful attack, and that strict laws of neutrality would prevent allies from offering their support in the event of war.<sup>18</sup> These legal realities, combined with concerns over potent commercial and diplomatic side effects of treaties, compelled the Framers to advocate for a centralized treaty-making power and federal supremacy over state law in this context.

Our findings confirm that Framers on both sides of the states' rights debate acknowledged that treaties approved by the federal government should take precedence over state laws and interests. To the Framers, this design was critical to ensuring nationwide compliance with treaty obligations and thus avoiding war, diplomatic embarrassment, and commercial harm. Recognizing the broad sweep of this power, however, the Framers placed strict structural limits on who could wield it and how. They designed these structural safeguards to protect states from federal abuse of the treaty power, while still preserving the flexibility required for the national government to act effectively in international affairs. In sum, the Framers crafted a treaty power strong enough to tightly bind the states, but structurally safeguarded to ensure it would be utilized carefully, given the high stakes of international commitments.

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16. See Oona A. Hathaway et al., *War Manifestos*, 85 U. CHI. L. REV. 1139, 1141, 1162-71 (2018).
17. Hugo Grotius, a Dutch jurist and philosopher from the late sixteenth and early seventeenth centuries, is widely regarded as the “Father of International Law.” HATHAWAY & SHAPIRO, *supra* note 15, at 27. In the seventeenth and eighteenth centuries, he was “known to all educated westerners” and his seminal work *The Law of War and Peace* was a “foundation for all future treatises on international law.” *Id.* at 27. James Madison, for instance, once noted that Grotius “is not unjustly considered . . . the father of the modern code of nations.” *Id.* (citing James Madison, *Examination of the British Doctrine, Which Subjects to Capture a Neutral Trade Not Open in Time of Peace*, in 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1794-1815, at 230, 234 (1865)). Emer de Vattel, a Swiss lawyer and diplomat, was “[t]he preeminent international law scholar of the eighteenth century,” *id.*, and also well known to the Framers, *id.* at 44. Both Grotius and Vattel wrote extensively on just causes of war under international law, including treaty violations. See Hathaway et al., *supra* note 16, at 1141-42 (citing HUGO GROTIUS, ON THE LAW OF WAR AND PEACE: THREE BOOKS 2.1.2.1, at 171 (Francis W. Kelsey, trans., 1925); EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 3.3.26, at 302 (P.H. Nicklin & T. Johnson eds., Joseph Chitty trans., 1758)).
18. Under the laws of neutrality at the time, any state that favored one side over another in a war—even through economic support—could face legal attack. See HATHAWAY & SHAPIRO, *supra* note 15, at 44-45.

Although much has changed since the Founding Era,<sup>19</sup> this Comment posits that the principles animating the Framers' formulation of the treaty power remain relevant in determining its scope today. One need not adhere to an originalist school of constitutional interpretation to appreciate the value of understanding the principles that undergirded the Constitution's text.<sup>20</sup> To the degree that those principles transcend era-specific considerations, they offer important guidance to treaty negotiators, legislators, and courts in interpreting the treaty power within a contemporary context. Even if the Framers' understanding of the treaty power does not conclude our constitutional inquiry, it offers a useful beginning.

This Comment proceeds in three Parts. In Part I, we discuss the *Bond* case and the parties' arguments concerning historical understandings of the treaty power. In Part II, we show that the parties overlooked a key consideration: the threat of war posed by treaty negotiations. Here, we examine key factors that shaped the original formulation of the treaty power, drawing on primary-source materials from the Founding Era. These sources demonstrate that the Framers, when drafting the Constitution and promoting it to the public, explicitly raised concerns that errant states could entangle the nation in war through treaty violations. We also identify structural considerations and contemporaneous controversies that reinforced the Framers' commitment to a centralized treaty power. Together, these factors drove the Framers to design a treaty power that would enable the federal government to proactively control the states' engagement with foreign nations, thereby protecting the nation from commercial infighting, diplomatic embarrassment, and – most importantly – war. Finally, in Part III we apply the factors that shaped the formulation of the treaty power to the open questions of *Bond* and extract principles that remain salient in interpreting the treaty power today.

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19. For instance, since the UN Charter was ratified in 1945, no country can legally declare war against another for a treaty violation. See HATHAWAY & SHAPIRO, *supra* note 15, at 212-14. This, however, has not stopped nations – including the United States – from invoking treaty violations as a justification for introducing U.S. armed forces into another nation's sovereign territory in the modern day. See, e.g., *Transcript and Video: Trump Speaks About Strikes on Syria*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/world/middleeast/transcript-video-trump-airstrikes-syria.html> [<https://perma.cc/FY7Z-PJAK>]; see also *infra* note 117 (outlining two differences between the understanding of treaties in the Founding Era and today).

20. See JACK M. BALKIN, *LIVING ORIGINALISM* 3, 277 (2011); Hathaway et al., *supra* note 2, at 244 (examining the history of international lawmaking to better understand the treaty power).

## I. *BOND*'S COMPETING UNDERSTANDINGS OF THE TREATY POWER

When the Supreme Court issued its opinion in *Bond*, it failed to resolve crucial questions of the treaty power's scope.<sup>21</sup> On the table were two competing accounts of the federal treaty power, set forth in the petitioner's and the government's briefs. Although both sides discussed historical forces that shaped the Framers' understanding, they overlooked a key factor that might have helped the Court resolve the constitutional question in *Bond*: the risk of war embedded in treaties at the time of the Founding. Because the Court did not answer the constitutional question in *Bond*, this issue is likely to resurface in the future. Understanding the Framers' motivations in crafting the treaty power thus remains critical to resolving finally these disagreements over its scope.

A core conflict between the litigants' positions in *Bond* centered on what the Framers valued more in crafting the treaty power: a limited federal government designed to protect states' rights and individual liberty, or a strong federal government capable of pursuing effective foreign policy to protect national interests and security.

On the one hand, the petitioner in *Bond* highlighted the Framers' intent to "create . . . [a] limited national government with enumerated powers addressed to matters of distinctly national and international concern."<sup>22</sup> According to *Bond*, if the government could lawfully charge her for a "decidedly local crime" under the federal statute implementing the CWC, there would be no limit to Congress's ability to "enact any legislation rationally related to [a] treaty," even if it infringed on states' authority or individual rights.<sup>23</sup> All that would be required to "render the Framers' careful process of enumerating Congress'[s] limited powers for naught" would be an "agreement of the President, the Senate, and a foreign nation."<sup>24</sup> The Framers could not have intended such an outcome, *Bond* argued, and instead must have assumed that subject-matter limits were inherent in the treaty power and the federal government's implementing authority.<sup>25</sup>

On the other hand, the government emphasized the Framers' desire to "empower[] the Nation to carry out its international legal commitments in furtherance of U.S. foreign policy and national security goals."<sup>26</sup> To maintain the balance of federal and state power, while still imbuing the federal government with

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21. *Bond v. United States*, 134 S. Ct. 2077 (2014).

22. Brief for Petitioner, *supra* note 7, at 19.

23. *Id.* at 2-3.

24. *Id.* at 17.

25. *See id.* at 19.

26. Brief for the United States, *supra* note 12, at 26.

sufficient flexibility to advance effective foreign policy, the Framers imposed *structural* limitations on treaties.<sup>27</sup> Such an arrangement, the government argued, “safeguarded the interests of the States by requiring that treaties be approved by two-thirds of the Senate, which they saw as the protector of State sovereignty.”<sup>28</sup> Although the principles that influenced the treaty power’s original development could have persuasively vindicated the government’s structural claims, the government did not adequately explain these historical considerations. As Part II will clarify, the Framers opted for rigorous structural and political safeguards, instead of subject-matter limitations, to prevent abuse and preserve diplomatic flexibility.

Rather than settle this debate, the Court avoided the constitutional question altogether.<sup>29</sup> Instead, the Court held that Section 229 of the Chemical Weapons Convention Implementation Act simply did not reach Bond’s crime.<sup>30</sup> Although Justice Scalia concurred in the judgment, he criticized the potential implications of the decision. By refusing to resolve the constitutional issue, he argued, the decision left Congress “only one treaty away from acquiring a general police power,”<sup>31</sup> given the ever-growing scope of international agreements. Both he and Justice Thomas raised concerns that the lack of substantive resolution meant that the Court would have to revisit the same issue in a later case.<sup>32</sup>

Regardless of one’s position on the arguments put forth by the petitioner and the government, the fact remains that without a definitive ruling from the Court on the treaty-making powers granted to the federal government under Article II, lower courts will continue to clash<sup>33</sup> and the proper balance of federal

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27. *See id.* at 32.

28. *Id.*

29. *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (citing *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

30. *Bond*, 134 S. Ct. at 2093; *see also* Chemical Weapons Convention Implementation Act of 1998 § 201, 18 U.S.C. § 229(a)(1) (2012) (forbidding any person knowingly “to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon”).

31. *Bond*, 134 S. Ct. at 2101 (Scalia, J., concurring in the judgment).

32. *Id.* at 2102; *id.* at 2110–11 (Thomas, J., concurring in the judgment).

33. *See* Petition for Writ of Certiorari at 17–22, *Bond*, 134 S. Ct. 2077 (No. 12–158) (explaining the “divergent views within the lower courts” over the scope and meaning of *Missouri v. Holland*’s dictum). On one side, the Third, Second, and Eleventh Circuits have adopted a more expansive reading of *Holland*, focusing on whether or not the treaty itself is valid. “If the treaty is valid,” the Third Circuit has explained, “there can be no dispute about the validity of the [implementing] statute.” *United States v. Bond*, 681 F.3d 149, 166 (3d Cir. 2012) (quoting *Missouri v. Holland*, 252 U.S. 416, 432 (1920)), *rev’d*, 134 S. Ct. 2077; *see also* *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998) (“If the Hostage Taking Convention is a valid exercise of the



and state power where foreign policy and domestic law meet will remain unresolved. The constitutional question of *Bond* remains open and pressing.

## II. THE THREAT OF WAR INHERENT IN INTERNATIONAL TREATY-MAKING AND OTHER FACTORS THAT SHAPED THE FRAMERS' CONSTRUCTION OF THE TREATY POWER

Much as the Justices' and litigants' positions diverged in *Bond*, their arguments shared one key similarity: they ignored crucial factors shaping the formulation of the treaty power that remain relevant today. In the Founding Era, treaty membership was a serious commitment: under international law, violating treaty obligations constituted a just cause for war.<sup>34</sup> As a young nation facing Europe's great powers, America could not afford to provoke an unconsidered war. Furthermore, given that the nation's economic and political survival depended on its ability to develop its reputation as a reliable trading partner, the Framers were concerned with ensuring that the national government could keep its word internationally. As our Comment reveals, the potentially catastrophic consequences of treaty violations at the time heavily influenced the Framers as

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Executive's treaty power, there is little room to dispute that the legislation passed to effectuate the treaty is valid under the Necessary and Proper Clause." (citing *Holland*, 252 U.S. at 432)); *United States v. Ferreira*, 275 F.3d 1020, 1027-28 (11th Cir. 2001) (embracing the Second Circuit's analysis in *Lue* regarding congressional authority under the Necessary and Proper Clause to implement the Hostage Taking Convention by enacting the Hostage Taking Act). According to these courts, where the treaty is a valid exercise of executive power, the only remaining question is whether or not "the legislation . . . meet[s] the Necessary and Proper Clause's general requirement that legislation implemented under that Clause be 'rationally related to the implementation of a constitutionally enumerated power.'" *Bond*, 681 F.3d at 157 (quoting *United States v. Comstock*, 560 U.S. 126, 134 (2010)); *Lue*, 134 F.3d at 87. On the other side, the Ninth and D.C. Circuits have indicated that, even under *Holland*, the federal government's power to implement treaties is bounded by subject-matter limits. See *In re Air-crash in Bali, Indon.* on Apr. 22, 1974, 684 F.2d 1301, 1309 (9th Cir. 1982) ("[T]reaty provisions which create domestic law have the same effect as legislation, and . . . are subject to the same substantive limitations as any other legislation."); *Power Auth. of N.Y. v. Fed. Power Comm'n*, 247 F.2d 538, 543 (D.C. Cir. 1957) ("No court has ever said, however, that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations."), *vacated sub nom.* *Am. Pub. Power Ass'n v. Power Auth. of State of N.Y.*, 355 U.S. 64 (1957).

34. See Oona A. Hathaway et al., *supra* note 16, at 1187 ("Of the just war claims made in the manifestos in our collection [of 350 war manifestos issued from 1492 to 1945], 170 were treaty violation claims, constituting 12.4 percent of all claims and contained in 51.2 percent of all manifestos. Of the 170 manifestos containing treaty claims, 40 (23.5 percent, or 12.0 percent of all manifestos) identified this reason as the manifesto's primary justification."). For example, in the Fourth Anglo-Dutch War from 1780-1784, Great Britain primarily justified its attack on the Netherlands by citing the Netherlands's alleged violation of the Perpetual Defensive Alliance treaty formed in 1678. See *id.* at 1189.

they crafted the treaty power and promoted it to the American people. This historical context should inform our contemporary understanding of the power's scope and limitations.

*A. Concerns About the Threat of War During the Drafting Process and in Contemporaneous Publications*

Not only were the Framers aware that treaty violations could lead to war; they were also guided by this threat in their drafting decisions. Although there is a “paucity of material directly addressing the scope of the treaty power” from the Constitutional Convention,<sup>35</sup> a close analysis of the ratification debates reveals that the Framers expressly considered the risk of war posed by treaty violations and invoked this threat in their arguments for a centralized treaty power. As the following Sections demonstrate, the discussions in the Constitutional Convention, state ratifying conventions, *Federalist Papers*, and other Founding Era documents all reveal that the Framers regularly considered the risk of provoking war through treaty violations as they conceived of and developed the treaty power.

*1. The Constitutional Convention and the Origins of the Treaty Power*

The threat of provoking war through treaty violations played a critical role in the development of the treaty power at the start of the 1787 Convention. In his opening speech, Virginia Governor Edmund Randolph outlined the major “defects” of the Articles of Confederation. Chief among these defects was the fact that the Articles “d[id] not provide against foreign invasion. If a State act[ed] against a foreign power contrary to the laws of nations or violate[d] a treaty, [the Confederation could not] punish that State, or compel its obedience to the treaty . . . . It therefore [could not] prevent war.”<sup>36</sup> Randolph’s emphasis on state compliance with treaties in order to “prevent war” at the outset of the Convention provides striking evidence that this threat was at the forefront of the Framers’ minds as they began the drafting process. Although the two most prominent constitutional proposals, the Virginia Plan and the New Jersey Plan, conceived of dramatically different executive authorities, they agreed on one central point: the United States needed to mitigate the risk of war through mechanisms that would ensure state compliance with treaties.

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35. Golove, *supra* note 2, at 1134.

36. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 23–25 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

a. *The Virginia Plan*

The debates surrounding the Virginia Plan and the federal “negative” power it proposed provide strong evidence that the Framers were aware of and motivated by the threat of war embedded in the treaty power. The Framers of the Virginia Plan took national treaty obligations so seriously that they would have granted the national legislature the power “[t]o negative all laws, passed by the several States, contravening, in the opinion of the national legislature, the articles of union . . . or any Treaties subsisting under the authority of the union.”<sup>37</sup> In sharp contrast to the limited authority granted by the Articles of Confederation, this sweeping power – a predecessor to the Supremacy Clause – would have provided a direct and immediate way for the national government to enforce state compliance with federal treaties. Taken alongside the concern of Governor Randolph, one of the main proponents of the Virginia Plan, with preventing “foreign invasion,” the Virginia Plan’s conception of a national legislature vested with the power to negative state laws demonstrates the Framers’ consideration of the threat of war posed by treaty violations as they drafted the Constitution.

The evolution of the Virginia Plan’s negative power further illustrates this point. The original version of the Virginia Plan’s negative clause proposed by Madison only granted the federal government the power to negative state laws “contravening . . . the articles of Union.”<sup>38</sup> When Benjamin Franklin first added “Treaties” to the shelter of the negative clause two days later, the addition generated no debate or controversy – a rarity at this early stage of the Convention.<sup>39</sup> Instead, the delegates appeared largely to agree on the importance of guaranteeing state compliance with federal treaty obligations, repeatedly raising the threat of provoking war through treaty violations during debates over the clause.<sup>40</sup> As South Carolina delegate Charles Pinkney put it, “[T]he States must be kept in due subordination to the nation . . . if the States were left to act of themselves . . . it w[ould] be impossible to defend the national prerogatives.”<sup>41</sup> Under the Articles of Confederation, he reminded his colleagues, “foreign treaties [had not] escaped repeated violations” that could have ended dangerously for the nation.<sup>42</sup> Behind the scenes, other Framers made similar arguments. In a letter to

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37. *Id.* at 47 (emphasis added).

38. *Id.* at 21.

39. *Id.* at 47.

40. See Golove, *supra* note 2, at 1102 (“It was famously the difficulty of obtaining state compliance with treaties that was among the foremost reasons impelling the movement toward Philadelphia, and that experience left an unmistakable imprint on the text adopted.”).

41. 1 FARRAND’S RECORDS, *supra* note 36, at 164.

42. *Id.*

George Washington, Madison argued the “negative [power] in all cases whatsoever on the legislative acts of the States . . . appears . . . to be absolutely necessary” in order to prevent the States from “continu[ing] to . . . violate treaties.”<sup>43</sup> Treaties were powerful, but they could also be dangerous—a reality evidently motivating the Framers who crafted and supported this progenitor of the Supremacy Clause and the treaty power.

*b. The New Jersey Plan*

Reflecting the interests of small states at the Convention, the New Jersey Plan privileged state sovereignty over a strong national government.<sup>44</sup> To achieve this goal, the New Jersey Plan’s drafters eliminated the negative power altogether, instead replacing it with what would later become the Supremacy Clause.<sup>45</sup> Even as this Plan sought to limit the power of the federal government, however, its drafters still recognized the need to enforce treaty obligations. The New Jersey Plan’s early version of the Supremacy Clause explicitly identified “treaties” as “supreme law of the respective States” and gave the federal government authority to “call forth [the] power of the Confederated States” in order to “enforce and compel [state] obedience . . . [to national] treaties.”<sup>46</sup> The drafters’ decision to include treaties as “supreme law of the respective States”—in keeping with the Virginia Plan’s negative clause—suggests a shared appreciation for the importance of ensuring state compliance with treaty obligations, even among those Framers who preferred a small federal government.<sup>47</sup>

The ensuing debates on the New Jersey Plan further reinforce this shared concern for upholding international treaty obligations, particularly in light of the threat of war. Indeed, many opponents of the New Jersey Plan argued that it did not go far enough to mitigate this risk. In a speech critiquing the Plan, Madison asked, “Will it prevent those violations . . . of Treaties which if not prevented

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43. Letter from James Madison to George Washington (Apr. 16, 1787) (on file with the National Archives).

44. See Aaron T. Knapp, *The New Jersey Plan and the Structure of the American Union*, 15 *GEO. J.L. & PUB. POL’Y* 615, 618 (2017).

45. See 1 *FARRAND’S RECORDS*, *supra* note 36, at 245.

46. *Id.*

47. *Id.* William Paterson, one of the New Jersey Plan’s primary drafters, also considered calling for unanimous state consent for all federal treaties as another mechanism to ensure state compliance, although it appears he never delivered the speech he prepared on this subject. William Paterson, *Notes of William Paterson in the Federal Convention of 1787*, AVALON PROJECT (2008), [http://avalon.law.yale.edu/18th\\_century/patterson.asp](http://avalon.law.yale.edu/18th_century/patterson.asp) [https://perma.cc/83BY-6YYP] (“[B]efore a Treaty can be binding, each State must consent.”).

must involve us in the calamities of foreign wars?”<sup>48</sup> According to Madison, “[T]he existing confederacy does not sufficiently provide against this evil. The proposed amendment to it does not supply the omission. It leaves the will of the States as uncontrouled as ever.”<sup>49</sup> Thus, to opponents, the Plan’s reliance on collective action to enforce compliance with treaty obligations and its rejection of the Virginia Plan’s negative power created a potentially fatal flaw: it left the national government unable to effectively prevent states from violating treaties and thus unable to avoid U.S. entanglement in “foreign wars.”<sup>50</sup> Under this Plan, the risk of an errant state exposing the nation to attack simply remained too high.

Ultimately, this conflict over the negative power was overshadowed by the introduction of the bicameral legislature in the Great Compromise.<sup>51</sup> In the wake of this new proposal, the delegates opted for a stronger version of the New Jersey Plan’s Supremacy Clause in lieu of the negative power. Delegates believed the negative power was no longer necessary “if sufficient Legislative authority should be given to the Genl. Government” and the courts via the Supremacy Clause.<sup>52</sup> Notably, however, throughout these debates no Framers questioned the importance of including treaties in the Supremacy Clause. This component remained a key fixture of the final version: “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . any Thing in the . . . Laws of any State to the contrary notwithstanding.”<sup>53</sup>

## 2. State Ratifying Conventions

As they debated the draft Constitution, delegates to the state ratifying conventions explicitly identified treaty violations as just causes of war on multiple

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48. 1 FARRAND’S RECORDS, *supra* note 36, at 316.

49. *Id.* The very same day that Madison raised these concerns, the Convention voted to table the New Jersey Plan. *See* Knapp, *supra* note 44, at 618.

50. 1 FARRAND’S RECORDS, *supra* note 36, at 316. Madison later raised related concerns that, under the New Jersey Plan, the national government could not prevent states from concluding their own independent treaties. *Id.* at 326-27.

51. *See* 2 *id.* at 13-21; MELVIN YAZAWA, CONTESTED CONVENTIONS: THE STRUGGLE TO ESTABLISH THE CONSTITUTION AND SAVE THE UNION, 1787-1789, at 62 (2016); Yoo, *supra* note 15, at 2031-32.

52. 2 FARRAND’S RECORDS, *supra* note 36, at 27; *see also id.* at 28 (recounting the Framers’ discussion of the negative power as unnecessary).

53. *Id.* at 663.

occasions, expressing concern over the perils one state might bring upon the others.<sup>54</sup> Delegates generally drew these connections as support for why the treaty power should be centralized in the federal government and why federal law—or at least federal treaties—must supersede contradictory state law.

For example, in the Virginia ratification debates, delegate William Grayson referenced the “law of nations” and just-war theory as reasons to centralize the treaty power in the hands of federal authorities: “If I recall rightly, by the law of nations, if a negotiator makes a treaty . . . , non-compliance with his stipulations is a just cause of war.”<sup>55</sup> Grayson’s point was that the looser model for treaty making and approval of the Articles of Confederation was dangerous; unless treaties made by the federal government carried authority over state-made law, they were not only useless, but worse still, they exposed the United States to legally justified attack.

Madison also directly identified treaty noncompliance as a cause for war during the Virginia ratifying convention:

Here the supremacy of a treaty is contrasted with the supremacy of the laws of the states. It cannot be otherwise supreme. If it does not supersede their existing laws, as far as they contravene its operation, it cannot be of any effect. *To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war.*<sup>56</sup>

Unless treaties made by the federal government carried authority over state-made law, in Madison’s view, they could lead to legal liability and potentially war. The federal government needed to wield ultimate authority—at least when it came to treaties—because the inability of the federal government to comply with its treaty obligations would not only ruin the United States’ reputation as a treaty partner, but also expose the new country to legally justified attack.

In keeping with this theme, Robert Livingston, a delegate to the New York ratifying convention, explicitly identified treaty violations as a just cause of war in support of his argument for federal judicial review of treaties. In his view, if states were given leeway in treaty interpretation, “it would be in the power of any state to commit the honor of the Union, defeat their most beneficial treaties, and involve them in a war.”<sup>57</sup> The Framers were indeed concerned with what might happen should the power to form treaties be held widely or taken lightly.

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54. See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 342, 515 (Johnathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT’S DEBATES].

55. *Id.* at 342.

56. *Id.* at 515 (emphasis added).

57. 2 *id.* at 215.

Their references to treaty noncompliance as a just cause of war demonstrate their recognition that a well-crafted treaty power could reduce the United States' risk of attack.

### 3. *The Federalist Papers and Other Contemporary Publications*

The *Federalist Papers* and other publications from the Founding Era provide further evidence that the Framers not only understood the legal obligations and risks inherent in treaties, but also saw the Constitution's protections against these dangers as a selling point. As early as 1784, Alexander Hamilton directly invoked both Vattel and Grotius<sup>58</sup> in his "Letter from Phocion to the Considerate Citizens of New York," in which he criticized New York for flagrantly violating the Treaty of Peace with Great Britain less than a year after it had been concluded.<sup>59</sup> By breaching the treaty with Great Britain, Hamilton argued, New York had brought "infinite injury" to the nation and opened the door to reciprocal noncompliance by Great Britain, or worse.<sup>60</sup> Hamilton's explicit references to Vattel and Grotius—who wrote extensively on the legal justifications for war, including treaty noncompliance—demonstrate his familiarity with the threat of war inherent in treaty violations. That Hamilton chose to invoke these scholars in a public letter written to put pressure on the New York State Legislature also suggests that state officials and informed voters at the time of the Founding were aware of the risks that treaties imposed on the nation, including the prospect of war.

Similarly, in two of the earliest *Federalist Papers*, John Jay explicitly appealed to the threat of war inherent in treaty violations to persuade states to ratify the Constitution. In making the case for national unity, Jay noted that "[t]he *just* causes of war, for the most part, arise either from violation of treaties or from direct violence."<sup>61</sup> As a result, Jay stated, "[i]t is of high importance to the peace of America that she observe the laws of nations towards all these powers, and . . . this will be more perfectly and punctually done by one national government."<sup>62</sup>

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58. For a discussion of Vattel and Grotius and their historical importance, see *supra* note 17.

59. See ALEXANDER HAMILTON, A LETTER FROM PHOCION TO THE CONSIDERATE CITIZENS OF NEW YORK (Jan. 27, 1784), reprinted in 3 PAPERS OF ALEXANDER HAMILTON 483, 491-92 (Harold C. Syrett ed., 1962) ("Breach of treaty on our part will be a just ground for breaking it on theirs. . . . The wilful breach of a single article annuls the whole.") [hereinafter LETTER FROM PHOCION].

60. *Id.* at 492.

61. THE FEDERALIST NO. 3, at 10 (John Jay) (Clinton Rossiter ed., 1961).

62. *Id.* at 11.

Hamilton employed this same refrain to great effect in *Federalist No. 22*. Because “[t]he treaties of the United States, under the present Constitution, are liable to the infractions of thirteen different legislatures,” he argued, “[t]he faith, the reputation, *the peace* of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed.”<sup>63</sup> The references by Jay, Hamilton, and Madison<sup>64</sup> to the threat of war posed by treaty noncompliance demonstrate the Framers’ familiarity with this principle of international law and their belief that appealing to it would help convince the American people to adopt the Constitution, as it had convinced their colleagues during the drafting process.

In sum, an extensive body of historical evidence—including Convention records, the state ratification debates, and the *Federalist Papers*—reveals that the Framers understood the risk of war inherent in treaty obligations and accounted for it in their decision-making while designing the treaty power. The Framers recognized that without a radical departure from the Articles of Confederation, the United States would remain powerless to prevent state treaty breaches and, consequently, internationally justified attack.

#### *B. Other Strategic Concerns: Diplomacy and Commerce*

The threat of war posed by treaty violations loomed large in the minds of the Framers as they drafted the treaty power, but it was not the only concern driving their desire for a centralized treaty-making authority. In particular, the Framers also focused on: (1) the need to be taken seriously as a national government by the European powers; and (2) the need to coordinate national trade policy to prevent foreign trading partners from playing states off one another. The Framers’ diplomatic and commercial concerns over treaty compliance further motivated them to build centralized control and enforcement mechanisms into the new Constitution. Taken alongside the fear of inciting military attack, these motivations help inform our understanding of the scope of the treaty power in the Founding Era and today—as a centralized power constrained by structural, and not subject-matter, limitations.

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63. THE FEDERALIST NO. 22, *supra* note 61, at 119 (Alexander Hamilton).

64. See THE FEDERALIST NO. 42, *supra* note 61, at 233 (James Madison) (discussing the ability of “any indiscreet member [of the Confederation] to embroil the confederacy with foreign nations” under the Articles of Confederation because the “articles contain[ed] no provision for the case of offences against the law of nations”).



1. *Diplomatic Considerations*

First, in addition to fears of attack, the Framers' desire to be taken seriously by the European powers also influenced their vision of the treaty power. As the Framers negotiated the new Constitution, they were frustrated by America's weak position on the international stage.<sup>65</sup> The inability of the federal government to force states to allow the collection of prewar British debts – a key provision of the Treaty of Peace, under which Great Britain recognized the United States as an independent nation – had been a source of great embarrassment to the Framers.<sup>66</sup> Furthermore, because Congress lacked the authority to ensure state compliance with federal treaties under the Articles of Confederation, U.S. diplomats were not taken seriously in negotiations with the European powers.<sup>67</sup>

James Wilson of Pennsylvania directly invoked these diplomatic impediments as he argued for a centralized treaty power that would take precedence over state law: "What is the reason that Great Britain does not enter into a commercial treaty with us? Because Congress has not the power to enforce its observance. But give them those powers . . . and they will have more permanency than a monarchical government."<sup>68</sup> As Robert Livingston of New York warned, if states had a role in diplomacy, they could "commit the honor of the Union" to agreements as they wished, without regard for treaties carefully designed by the federal government to promote the national interest, such as the Treaty of Peace.<sup>69</sup> Unless and until Congress could demonstrate its control of the states to Europe, the United States would continue operating at a diplomatic disadvantage. Thus, the Framers adopted a strong centralized treaty power partly out of a desire to preempt states from involving themselves in treaty negotiations. A stronger federal hand at the negotiating table would prevent foreign nations from playing to individual state interests and would encourage European powers to take the federal government seriously as the sole diplomatic representative of the United States.

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65. See Golove, *supra* note 2, at 1102-03.

66. See *id.* at 1115-16; see also 2 ELLIOT'S DEBATES, *supra* note 54, at 124, 526.

67. See Golove, *supra* note 2, at 1114-16; see also 9 PAPERS OF THOMAS JEFFERSON 107-15 (Julian P. Boyd ed., 1954) (detailing complaints from the French Minister Count de Vergennes regarding alleged state noncompliance with a French treaty); *id.* at 139-46 (describing how the French Minister postponed Jefferson's meeting on "the whole Subject of our Commerce with France" and made Jefferson wait while a "Number of Audiences of Ambassadors and other Ministers . . . t[ook] Place of Course before [his]").

68. 1 ELLIOT'S DEBATES, *supra* note 54, at 451.

69. 2 *id.* at 215.

## 2. National Coordination of Trade Policy

In addition to diplomatic considerations, the Framers centralized the treaty-making power because they recognized state involvement in the process would be detrimental to the U.S. economy as a whole. If states had the power to form and enforce their own commercial agreements, or were given an outsized role in negotiating federal treaties, states would compete against each other for foreign trade deals. Delegates to the federal and state ratifying conventions frequently referenced the need to coordinate trade policies by placing the treaty power solely in the hands of the federal government.<sup>70</sup> In one such discussion, state delegates discussed commercial treaties the United States had already formed with Sweden and the Netherlands, and the need for national coordination: “[S]uch internal arrangements should be made as may strictly comport with the faith of those treaties . . . . If the legislature of each state adopts its own measures, many and very eminent disadvantages must . . . necessarily result therefrom.”<sup>71</sup> Were individual state legislatures able to enact their own trade policies, it would be impossible to achieve uniform treaty interpretation or present a united national front in commercial treaty negotiations.

These fears were well grounded in recent history: an incident in which a European power had played different states off one another had seriously threatened the young nation’s unity a year earlier.<sup>72</sup> From 1785 to 1786, Secretary of Foreign Affairs John Jay had been negotiating the boundaries between the United States and the Spanish territories in North America with Spanish Ambassador Don Diego de Gardoqui.<sup>73</sup> One of the most contentious issues during the negotiations was whether Spain would reopen portions of the Mississippi River that flowed through its territory to U.S. traffic. Southern states desperately wanted access to the Mississippi’s southern stretches for their agricultural populations to press westward, while Spain was hesitant to facilitate further U.S. exploration of Spanish territory.<sup>74</sup> Instead of river access, Gardoqui proposed a

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70. See *id.* at 79, 112, 124; see also Alexander Hamilton, *The Defence No. XXXVI*, N.Y. HERALD (Jan. 2, 1796), reprinted in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 59, at 3, 9 (marking that the Constitution “vests the power of making Treaties in *The President* with consent of the Senate”).

71. 1 ELLIOT’S DEBATES, *supra* note 54, at 112.

72. The postwar negotiation and implementation of the Treaty of Peace with Great Britain offered the Framers similar lessons regarding the need for a mechanism to enforce state compliance with treaties, even when articles of the treaty were difficult or painful to follow. See Golove, *supra* note 2, at 1115-16.

73. See Golove, *supra* note 2, at 1133; see also Michael Allen, *The Mississippi River Debate, 1785-1787*, 36 TENN. HIST. Q. 447 (1977); Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271 (1934).

74. See Allen, *supra* note 73, at 447.

commercial treaty detrimental to southern states but extremely attractive to northern states with port cities.<sup>75</sup> Congress deadlocked as a result of his offer, largely because of the North's and South's competing visions for the country's economic and territorial future and confusion over the treaty-approval process under the Articles of Confederation.<sup>76</sup> Those in favor of Gardoqui's proposal—delegates from seven of the thirteen states—argued that the Articles permitted a simple majority to change the instructions to Jay, and they endorsed his acceptance of the Spanish proposal.<sup>77</sup> However, southern representatives insisted the United States must not concede navigation rights to the Mississippi River for any period of time. It quickly became clear that even if the United States and Spain agreed to the Jay-Gardoqui Treaty internationally, it would never receive the nine state votes necessary to take legal effect under the Articles of Confederation.<sup>78</sup>

Although the Treaty was never ratified, the Jay-Gardoqui controversy arose repeatedly in the debates over which entities should be able to make treaties, how the process would operate, and how those treaties would be enforced. Southern delegates raised concerns that the nine-state approval requirement would not adequately protect their regional economic and territorial interests.<sup>79</sup> Madison and other proponents of popular sovereignty assuaged these concerns, however, by pointing to the new Constitution's key protection against tribalism in treaty negotiations: the role of the executive in the treaty-making process. There was no need for concern, they argued, because the President would "more naturally revolt against a measure which might bring on him the reproach not only of partiality, but of a dishonorable surrender of a national right."<sup>80</sup> The controversy led the Framers to place the treaty power solely in the hands of the federal government and to give broad negotiation authority to the President, as states would be too inclined to focus on their own self-interest.<sup>81</sup>

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75. See *id.* at 454-55.

76. See *id.* at 455-56; see also Golove, *supra* note 2, at 1133.

77. See Golove, *supra* note 2, at 1133.

78. See Allen, *supra* note 73, at 464-65.

79. See 2 FARRAND'S RECORDS, *supra* note 36, at 297-98; see also Golove, *supra* note 2, at 1133 ("Continuing fear that the Northern states would make another attempt to cede the nation's territorial rights in the Mississippi River played a major role in the discussions of the treaty power."). One southern delegate even raised concerns that "the Senate . . . could already sell the whole Country by means of Treaties." 2 FARRAND'S RECORDS, *supra* note 36, at 297.

80. Letter from James Madison to George Nicholas (May 17, 1788), reprinted in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 804, 808 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

81. See Golove, *supra* note 2, at 1133.

Thus, in addition to the threat of war, the Framers contemplated the need to establish U.S. diplomatic credibility on the world stage and to coordinate national trade policy in crafting the treaty power. Along with the fear of provoking attack, these concerns motivated the Framers to centralize the treaty-making authority in the federal government and to strengthen enforcement over the states, while still creating flexible bounds to its scope. To the Framers, this flexibility was key to effective diplomatic negotiations and trade policies – critical elements of foreign policy for the young nation.

### III. INTERPRETING THE TREATY POWER TODAY

#### A. *Implications for Bond*

Drawing upon this more complete understanding of the Founding Era conception of the treaty power, we return to the central question in *Bond*: what are the limits to Congress’s ability to implement an Article II treaty? More specifically, what do the debates of the Framers tell us about Congress’s ability to regulate intrastate activities, such as Carol Bond’s “purely local crime,”<sup>82</sup> when implementing an Article II treaty?

To begin, our findings indicate that subject-matter limitations are a historically incongruent means of cabining Congress’s power to implement Article II treaties.<sup>83</sup> In her briefing before the Court, Bond argued that Congress’s authority to enact legislation implementing an Article II treaty “depends on the existence of a nexus to a matter of national or international importance.”<sup>84</sup> Justice Thomas echoed this argument in his concurrence, suggesting that subject-matter limitations comport with the “Treaty Power as it was originally understood.”<sup>85</sup>

Yet the history we describe above shows that the Framers *did not* rely on subject-matter limitations – or the degree of a treaty’s “international importance” –

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82. *Bond v. United States*, 134 S. Ct. 2077, 2083 (2014).

83. This finding aligns with the *Third Restatement’s* conclusion that “the Constitution does not require that an international agreement deal only with ‘matters of international concern.’” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. c (AM. LAW INST. 1987).

84. Brief for Petitioner, *supra* note 7, at 29.

85. *Bond*, 134 S. Ct. at 2103 (Thomas, J., concurring in the judgment); *see also* Bradley, *supra* note 2, at 433-39 (criticizing the view that the delegation of the treaty power to the federal government precludes meaningful subject-matter limitations). *But see* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 197 (2d ed. 1996) (finding “no basis for reading into the Constitution such a limitation on the subject matter of treaties”).

to ground the treaty power. Rather, to ensure that the federal government possessed sufficient flexibility to craft effective foreign policy and safeguard the nation from foreign threats, the Framers intentionally eschewed subject-matter limitations.<sup>86</sup> That several Founding Era treaties centered on traditional topics of foreign affairs, such as peace and trade, does not detract from the broad scope of the treaty power as originally crafted. As Randolph put it, “The various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition.”<sup>87</sup>

Indeed, neither petitioner Bond nor any of the Justices offered a set of metrics to determine when conduct is sufficiently “international” to permit federal regulation under the treaty power. Had they tried to do so, they would have had to choose between specifying *ex ante* certain “international” topics on which treaties could be concluded, or permitting judges to make individual determinations of a treaty’s “domestic” versus “international” subject matter.<sup>88</sup> The former contravenes the Framers’ deliberate decision not to enumerate subjects for which Article II treaties could be made.<sup>89</sup> The latter would endow judges with immense, and arguably arbitrary, discretion over how to distinguish domestic from international activity, given the ever-increasing overlap between the two categories. One court, for example, might conclude that domestic production of an unusually harsh pesticide sold exclusively in-state by a locally owned company was a purely “domestic” activity, unsuitable for regulation by treaty. Another court might conclude that, because certain toxins in pesticides run off into waterways and are extremely harmful to ocean life, regulation of such toxins is an “international” subject perfectly capable of being addressed by treaty.

This is not to say that the Framers necessarily intended for treaties to address purely domestic issues, such as Bond’s “local crime.”<sup>90</sup> Far from it. The Framers remained attentive to protecting state interests and established strict structural and political checks to prevent such transgressions.<sup>91</sup> They constructed a treaty power demanding broad consensus for its use, requiring two thirds of the Senate to give advice and consent before the President may ratify a treaty, and then majorities in each house of Congress to pass implementing legislation for non-self-executing treaties.<sup>92</sup> When faced with the trade-off between placing subject-

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86. See Golove, *supra* note 2, at 1091; *infra* Section III.B (discussing our third principle).

87. 3 ELLIOT’S DEBATES, *supra* note 54, at 363.

88. See Hathaway et al., *supra* note 2, at 285-86.

89. See U.S. CONST. art. II, § 2, cl. 2.

90. *Bond*, 134 S. Ct. at 2083 (majority opinion).

91. See *infra* Section III.B (discussing our second and third principles).

92. Hathaway, *supra* note 13, at 1273, 1318-20.

matter limitations on the federal treaty power or establishing structural and political limitations, the Framers chose structural controls. This choice preserved the flexibility critical for effective foreign policy, while still protecting the interests of the states. Recognizing the importance of international collaboration, the Framers presciently entrusted the federal government with the adaptability to shape and benefit from novel areas of global cooperation—today including efforts to combat extremism, cyberattacks, and environmental destruction.

Examining the Chemical Weapons Implementation Act in *Bond* in light of these considerations, we believe—as the Court did—that charging Bond under the Act was an inappropriate use of the statute, because it did not comport with the intentions of the treaty negotiators and Congress in drafting and approving the international agreement and implementing legislation.<sup>93</sup> Given the capability and traditional responsibility of the state to respond to her crime, which, while employing unusual means, had a purely domestic, interpersonal motivation, the Court was right to thoroughly scrutinize Congress’s legislative intent.<sup>94</sup> Absent “clear indication” that Congress intended to reach Bond’s crime, the Chemical Weapons Implementation Act should not have been so construed.<sup>95</sup> As our findings indicate, the Framers placed great weight on careful deliberation on international treaties;<sup>96</sup> to read into implementing legislation that which was not plainly stated, especially where other core constitutional principles are implicated, would contravene that design.

Were the Act’s drafters to have demonstrated such clear intention to criminalize local conduct through the treaty, however, it would have been a different matter. In such a case, the reviewing court’s inquiry would have turned on the process of enacting the treaty and implementing legislation to confirm that the treaty had satisfied each level of executive and congressional review. Any familiarity with the federal government today suggests such a scenario is extremely unlikely: it is hard to imagine a supermajority of the Senate and then majorities of both houses and the President agreeing to implement the Chemical Weapons Convention with clear intent to reach everyday criminal activity covered by local

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93. See *Bond*, 134 S. Ct. at 2083, 2089–93.

94. Were Bond motivated by political or terrorist ideology, rather than matrimonial rage, and had she used the chemicals to create a weapon capable of harming large numbers of people, rather than one, there would have been a better argument for charging her under the Act. This is because the treaty more explicitly purports to regulate “warfare” and because the global, interconnected nature of terrorism requires a nationally coordinated response. Had Bond been in a position of political power relative to her victim and employed sufficiently brutal acts, she also could have been charged appropriately under federal legislation implementing the Convention Against Torture. However, the hyperlocal nature of Bond’s conduct does not call for the heightened federal response that would be justified by these hypothetical situations.

95. *Bond*, 134 S. Ct. at 2083.

96. See *supra* Part II.

criminal codes and motivated by personal rather than political conflicts. Even accepting this hypothetical, however, our findings indicate that constitutional protections from federal abuse of the treaty power would stem not from the subject matter of the treaty, but from the structural controls that render such abuse effectively impossible. If Congress had intended the Act to cover hyperlocal conduct such as Bond's, Congress would have needed to make its intent clear, and the Act would have had to withstand several stages of executive and congressional scrutiny – in both the treaty-making and the legislative process – to carry legal force. Given that Congress did no such thing, the Court was correct to eschew application of the Act to Bond.

### *B. Principles for Interpreting the Treaty Power*

Drawing on a more complete understanding of how the Framers thought about treaties in their lifetimes, and the implications of this history for *Bond*, three principles stand out. These underlying principles drove the Framers' formulation of the treaty power and remain relevant to our interpretation of the Constitution today. Taken together, they offer useful guidance for understanding the possibilities and limits of the treaty power in *Bond's* aftermath.

The first principle is that the United States must speak to the international community with one voice: that of the federal government. In matters of war, trade, and diplomacy, the Framers were keen to centralize control at a national level, and to prevent individual states from conducting rogue diplomacy or refusing to comply with federal treaties.<sup>97</sup> For the Framers, the stakes were existential. Errant state behavior could lead to the “calamities of foreign wars,”<sup>98</sup> and very nearly did under the Articles of Confederation.<sup>99</sup> The Framers also feared that permitting states to pursue their own foreign policy agendas would cripple the federal government's credibility and leverage abroad.<sup>100</sup> Although contemporary circumstances differ, the underlying principle remains important: any

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97. See 2 ELLIOT'S DEBATES, *supra* note 54, at 215; 3 *id.* at 515; 1 FARRAND'S RECORDS, *supra* note 36, at 24-25, 164; LETTER FROM PHOCION, *supra* note 59, at 489-92; THE FEDERALIST NO. 3, *supra* note 61, at 10-11 (John Jay).

98. 1 FARRAND'S RECORDS, *supra* note 36, at 316.

99. See Golove, *supra* note 2, at 1116 (noting that “[a]t times, war [with Great Britain] seemed imminent” as some states resisted complying with the Treaty of Peace under the Articles of Confederation).

100. The Framers' worry was that state abrogation of national treaty commitments would undercut the credibility of the federal government and those who represent the nation abroad. The Framers were also concerned that states' actions could harm foreign governments' perceptions of the U.S. federal government's strength by advancing conflicting positions on an issue of international importance.

modern understanding of the federal government's treaty-making power must be strong enough to bind the whole nation to our international commitments.

The second principle is that the United States must take its treaty commitments seriously. This proposition was so important to the Framers that they created one of the most demanding thresholds for treaty ratification in the world,<sup>101</sup> with multiple stages of congressional and executive review before a treaty can take effect.<sup>102</sup> Because breaching a treaty in the Founding Era could lead to war, the Framers saw the need for diligent caution in entering into any international obligation. Having witnessed the fallout from the Jay-Gardoqui treaty, the Framers recognized that the best way to ensure that treaty obligations would be upheld was to enter into them only with consensus across branches of the federal government. Thus, the threat of legal attack stemming from treaty breaches in the Founding Era explains the cautious design of the treaty power, and reflects the Framers' beliefs that international agreements were not to be entered into casually—and that when they were entered into, they were to be strictly enforced.

The third principle is that structural, not subject-matter, limits bound the federal treaty power. As Thomas Jefferson, one of the staunchest advocates of

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With regard to contemporary federal-state treaty contestation, California, New York, and eleven other states' plan to comply with the Paris Agreement on climate change even after the Trump administration's withdrawal raises interesting questions regarding the principle of reserving international affairs for the federal government. See Jerry Brown & Michael Bloomberg, *Even Without the Trump Administration, the U.S. Is Upholding Its Commitment to the Paris Climate Agreement*, L.A. TIMES (Sep. 12, 2018, 4:15 AM), <http://www.latimes.com/opinion/op-ed/la-oe-brown-bloomberg-climate-summit-20180912-story.html> [https://perma.cc/VHY4-AJES]; Christopher Cadelago, *The Global Partnership Fighting Climate Change Expands. Is Trump Helping the Cause?*, SACRAMENTO BEE (Nov. 9, 2017, 12:01 AM), <https://www.sacbee.com/news/politics-government/capitol-alert/article183583516.html> [https://perma.cc/AZ44-EDKN]; Lauren Sommer, *If Trump Rejects Paris Climate Treaty, Could California Sign on?*, KQED (Dec. 12, 2016), <https://www.kqed.org/science/1228567/if-trump-wont-can-california-sign-the-international-climate-treaty> [https://perma.cc/SK5Z-E5UH]; Office of Governor Edmund G. Brown Jr., *U.S. Climate Alliance Adds 10 New Members to Coalition Committed to Upholding the Paris Accord* (June 5, 2017), <https://www.gov.ca.gov/2017/06/05/news19831> [https://perma.cc/KCC6-GBNE]. In one view, these states are acting in direct defiance of current federal policy toward climate change and circumventing the federal government to cooperate directly with foreign nations on these issues. However, these states are voluntarily complying with a treaty to which the United States technically remains a party, at least until 2020, and have not negotiated or concluded additional, formal treaties. As such, although these states' actions would violate this guiding principle of the Framers, we do not suggest they are illegal.

101. Hathaway, *supra* note 13, at 1271-74 (indicating that the United States is the only country in the world to require a supermajority in one legislative house to ratify treaties, while also excluding the lower house from that process).

102. See *id.*; *supra* note 92 and accompanying text.



states' rights in the Founding Era, admitted, "To what subjects [the treaty] power extends has not been defined in detail by the [C]onstitution."<sup>103</sup> Indeed, as the Framers well understood, structural limits are the only means of maintaining firm constitutional constraints on federal action while still allowing the government sufficient flexibility to respond strategically to international events. Operational flexibility was key to achieving the status and respect abroad that the Framers desired. For them, the decision not to specify the subjects of the treaty power was uncontroversial because there was no way to account for all situations that might require the federal government to coordinate internationally.<sup>104</sup> Rather than enumerate specific subjects for which the federal government could engage in treaties, the Framers relied on structural bounds to prevent abuse of the treaty power.<sup>105</sup>

However, it is crucial to note that the structural limitations built into the federal government's treaty-making authority do not imply the existence of a de facto police power—that is, a general ability to reach the conduct of citizens outside of Congress's enumerated powers. Our findings do not suggest that the Framers had any intention to create such an authority, but rather that they found structural bounds sufficient to prevent the federal government from fabricating a police power.<sup>106</sup> Moreover, the Court has consistently said that the treaty power could never be construed to "authorize what the [C]onstitution forbids"<sup>107</sup> by "contravening any prohibitory words to be found in the Constitution,"<sup>108</sup> such as the individual rights enshrined in the Bill of Rights. Accordingly, we find the

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103. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES 97 (U.S. Gov't Printing Office 1993) (1801), <https://www.senate.gov/artandhistory/history/resources/pdf/SDoc103-8.pdf> [<https://perma.cc/DW7M-7NA8>].

104. See 3 ELLIOT'S DEBATES, *supra* note 54, at 504, 514-15; Hathaway et al., *supra* note 2, at 246-50; see also Golove, *supra* note 2, at 1132-35, 1138, 1145 (discussing evidence from the Constitutional Convention and explaining that "with only one arguable exception, no one suggested that the treaty power would be limited to those subjects over which Congress could otherwise regulate pursuant to its legislative powers").

105. See Hathaway et al., *supra* note 2, at 246-50; see also Golove, *supra* note 2, at 1134-35. It follows that because of these structural bounds, the expansive subjects of modern treaties, such as the prohibition of chemical weapons, are not an immediate cause for alarm.

106. See Hathaway et al., *supra* note 2, at 248-50 (describing the Framers' concern for preventing an implied federal police power, and discussing the Framers' decision to impose "structural and political limits" on the treaty power, rather than subject-matter limitations).

107. *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); see also GLC Brief, *supra* note 12, at 18.

108. *Missouri v. Holland*, 252 U.S. 416, 433 (1920); see also GLC Brief, *supra* note 12, at 18.

theatrical hypotheticals raised in *Bond* to be overstated.<sup>109</sup> In practice, the individual protections of the Bill of Rights and the strict structural limitations placed on the Article II treaty power render such gross misuse effectively impossible.<sup>110</sup>

Even without subject-matter limitations on treaties, courts still have a role to play in determining the legitimacy of a treaty and its implementing legislation. They can look to the enactment process to ensure that the treaty at issue complies with the Constitution's structural restraints. They can also seek to determine that a treaty is bona fide.<sup>111</sup> Is there a genuine quid pro quo involved? Are the parties to a treaty each getting something that they want? Do mutual obligations flow directly from its terms? As Jefferson said, if it does not "concern the foreign nation party to the contract . . . it is a mere nullity."<sup>112</sup>

Under this analysis, the CWC and its implementing legislation, as understood by the *Bond* Court, reflect its signatories' mutual interest in avoiding the use of chemical weapons in war crimes and terrorist acts through collective commitment to prevent the production, distribution, and use of these weapons.<sup>113</sup> Applying this analysis, a court would uphold the CWC as a genuine mutual commitment between nations. A bona fide agreement reached between independent nations that has withstood the approval procedures established by the Framers must be treated as the supreme law of the land.<sup>114</sup> Courts can help ensure bona fide agreements are upheld by analyzing how they came to be and how they reflect agreement on interests shared between countries. Importantly, this form of judicial review is far more limited than examining the subject matter of treaties; to understand whether a treaty is "bona fide" requires only a determination that a mutual exchange of promises occurred. Where a quid pro quo between two or

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109. *Bond v. United States*, 134 S. Ct. 2077, 2100-02 (2014) (Scalia, J., concurring in the judgment) (warning that under the logic of the majority opinion, the federal government could, for example, "reenact the invalidated part of the Violence Against Women Act of 1994 . . . just so long as there were a treaty on point" or enter into an Antipolygamy Convention requiring legislation preventing a polygamist widower from inheriting his wives' estates even though the power to enact inheritance law is traditionally reserved to the states).

110. We could find no instance of the treaty power ever being abused in this manner in U.S. history, nor do we anticipate courts to permit clear violations of the constitutional rights of U.S. citizens to advance foreign policy interests.

111. See HENKIN, *supra* note 85, at 185 (noting that valid treaties must be "a bona fide agreement, between states, not a 'mock-marriage'"); Hathaway et al., *supra* note 2, at 326 ("A . . . limitation on the treaty power is a prohibition on the power of the federal government to enact a purely pretextual treaty."); Interview with Jack Balkin, Professor, Yale Law Sch., in New Haven, Conn. (Oct. 1, 2018) (discussing the judiciary's role in reviewing bona fide treaties).

112. JEFFERSON, *supra* note 103, at 97.

113. *Bond*, 134 S. Ct. at 2087 (majority opinion).

114. U.S. CONST. art. VI, cl. 2.

more nations exists, regardless of the subject of that exchange, a bona fide treaty has been formed.<sup>115</sup>

As the Framers debated and developed the treaty power, they were motivated by a diverse set of fears, frustrations, and past experiences. Many realities guiding the Framers' construction of the treaty power remain present today;<sup>116</sup> others do not.<sup>117</sup> However, even as the Framers reimagined the ideal structure of a national government, they respected the gravity of international legal commitments and played by the rules of the game when it came to international law.<sup>118</sup> They accepted the risks of treaty membership and the structure and subjects of treaties as legal realities, and constructed the treaty power accordingly. Thus, these contextual differences, while important to note, do not prevent the Framers' understanding of the treaty power from informing ours today. Rather, the principles driving the construction of the treaty power—(1) the importance of speaking with one voice internationally; (2) the need to take international legal commitments seriously; and (3) the preference for structural over subject-matter limitations—provide key bounds for negotiating and interpreting treaties in the modern era.

## CONCLUSION

As the Framers drafted the treaty power and debated its scope, they struck a balance between two competing sets of fears. Their first concern was that a strong federal government would become monarchical, trampling the rights of the states and their citizens. Their second concern was that creating a role for

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115. See HENKIN, *supra* note 85, at 185 (discussing the meaning of a “bona fide” treaty).

116. See *supra* note 19.

117. Two particular features distinguish treaties of the Founding Era from those of today. The first is the liability of a treaty commitment: prior to the ratification of the UN Charter in 1945, the international legal order allowed for parties to a treaty to lawfully attack another treaty party that breached its terms. See HATHAWAY & SHAPIRO, *supra* note 15, at xv-xvii, 199-213. As such, in the Founding Era, signing on to a treaty meant accepting a risk that the United States could be attacked if it failed to comply—a risk that does not exist to the same extent today. The second is the scope of treaties. Before World War II, treaties were typically bilateral. In the last several decades, however, treaties have included more parties, resembling “international ‘legislation.’” Bradley, *supra* note 2, at 396. Consequently, the Framers likely could not have conceived of a multilateral treaty such as the CWC, with 165 signatories agreeing to a complex schedule for the global destruction of chemical weapons. At their core, though, this treaty and those of the Founding Era still represent the same commitment: a willful, affirmative agreement with another independent sovereign to act in a mutually agreed-upon manner for the collective benefit of more than one nation. Because of this continuity, historical differences in the scope of treaties do not frustrate modern application of their guiding principles.

118. See Golove, *supra* note 2, at 1134; see also Hathaway et al., *supra* note 2, at 245-48 (discussing the Framers' design of the treaty power).

individual states in treaty-making – or allowing state laws to contradict national treaty commitments – could expose the United States to a heightened risk of legal attack by other nations, as well as commercial and diplomatic embarrassment. To protect state and individual rights, the Framers strictly delineated the domain of the federal government, granting it plenary authority over foreign affairs and the power to conclude international agreements. As the Framers' public statements and private writings demonstrate, they conceived of a treaty power that was strong enough to compel national compliance with the United States' international legal commitments. However, the Framers' interest in protecting states' rights and their establishment of clear structural bounds for the treaty power imply that this authority was never meant to extend indefinitely.

Because the Court declined to resolve the constitutional issue in *Bond*, questions surrounding the proper scope of the treaty power are likely to continue to vex litigants and courts,<sup>119</sup> as well as treaty negotiators and Congress. Although the legal obligations attached to treaties and the scope of modern international commitments have changed, the abiding principles that drove the Framers should continue to ground our interpretation of the treaty power today. Recognizing the careful balance that the Framers sought between these competing sets of concerns, this Comment finds the scope of the treaty power to be strong enough to bind the whole nation to its international commitments, but strictly limited by structural bounds so as to preserve the rights of states in our federal system of government.

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119. See *Bond v. United States*, 134 S. Ct. 2077, 2098 (Scalia, J., concurring in the judgment); *id.* at 2103 (Thomas, J., concurring in the judgment).

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